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ALEXANDER L. STEVAS,

Nos. 81-2147 and 81-2188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

State of Arizona, et al., Petitioners,
versus
San Carlos Apache Tribe of Arizona, et al.,
Respondents.

State of Montana, et al., Petitioners
versus
Northern Cheyenne Tribe of the
Northern Cheyenne Indian Reservation, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF WYOMING

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QUESTION PRESENTED:

DO STATE CONSTITUTIONAL DISCLAIMERS OF PROPRIETARY AUTHORITY OVER INDIAN LANDS DEPRIVE STATE COURTS OF SUBJECT MATTER JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS IN GENERAL STREAM ADJUDICATIONS CONDUCTED PURSUANT TO THE McCARRAN AMENDMENT?

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AMICUS CURIAE BRIEF OF THE STATE OF WYOMING

INTEREST OF AMICUS CURIAE

Wyoming is a "disclaimer" state,[1] whose district court has nevertheless exercised its jurisdiction to adjudicate claims to water for the Wind River Indian

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[1]Article 21, section 26 of the Wyoming Constitution contains a disclaimer provision virtually identical with those at issue in these cases. While Wyoming does not have an "enabling act" *per se*, its Act of Admission, 26 Stat. 222 (1890) is silent concerning jurisdiction over Indian lands.

Reservation, following the reasoning of decisions by the New Mexico Supreme Court as well as by the Tenth Circuit Court of Appeals.[2] Relying upon these rulings, Wyoming has spent approximately seven million dollars during the last five years in a continuing effort to adjudicate in state court, pursuant to the McCarran Amendment, all Indian, federal, state and private rights to use water in the Big Horn River system ("Big Horn Adjudication"). The United States,[3] the Shoshone and Arapahoe Indian Tribes [4] and many private parties to the Big Horn Adjudication have also invested heavily in the proceedings.

In January 1977, Wyoming began a general stream adjudication, pursuant to Wyoming Statutes section 1-37-106 (1977), to determine all rights to use water in the

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[2] *See in re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, Civil No. 4993 (Dist. Ct. Wyo. filed January 24, 1977) (Order denying United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction) (Dec. 19, 1977). At the time of the state court's ruling, only one reported case, *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976) had addressed the disclaimer issue. The Wyoming court reached the same result as did the New Mexico Supreme Court in *Lewis*.

In 1979, the United States Court of Appeals for the Tenth Circuit decided *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979), holding that the disclaimer provision of the New Mexico Constitution and Enabling Act, similar to Wyoming's, did not preclude adjudication of Indian water rights in New Mexico state courts. The Tenth Circuit's analysis paralleled that of the Wyoming state court more than a year earlier.

[3] Pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976), the United States was joined in its proprietary capacity and in its fiduciary capacity as trustee for the Shoshone and Northern Arapahoe Tribes of the Wind River Indian Reservation.

[4] Subsequent to the denial of the United States' motion to dismiss the state proceeding, the Tribes were granted leave to intervene permissively pursuant to Wyo. R. Civ. P. 24(b).

Big Horn River and all other sources of water in Wyoming's Water Division Three.[5] In 1979, the Wyoming state court referred the adjudication to a Special Master who conducted approximately 130 days of hearings concerning the claims to water on behalf of the Tribes of the Wind River Indian Reservation. In all, the Master has heard the testimony of over 80 witnesses and has received approximately 2,400 evidentiary exhibits. The transcript already comprises over 20,000 pages. The Master is currently preparing his report covering the claims to water for the Wind River Indian Reservation which is expected to be issued by the end of this year.

Three days after the Master closed the evidence concerning the claims for the Wind River Indian Reservation, the Court of Appeals for the Ninth Circuit decided *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), followed within two days by *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), and *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982).

Although Wyoming does not lie within the Ninth Circuit, affirmance of the Ninth Circuit's rulings on state constitutional disclaimers would not only jeopardize the interests of all parties to the Big Horn Adjudication in having their rights finally determined after a lengthy and costly proceeding, but would also threaten to undercut Wyoming's efforts to manage water for the benefit of all water users.

SUMMARY OF ARGUMENT

This Court recognized in *Colorado River Water Conservation District v. United States ("Akin")*, that

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[5] *In re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, Civil No. 4993 (Dist. Ct. Wyo. filed January 24, 1977).

state courts have subject matter jurisdiction to adjudicate Indian water rights as part of a general stream adjudication. The Ninth Circuit incorrectly assumed that state constitutional disclaimers require exclusion of Indian water rights from these state proceedings; if upheld, this ruling would render general stream adjudications impossible in most western states.

The Ninth Circuit ignored its own decisions, the decisions of this Court, and the plain meaning of the disclaimers themselves, by failing to recognize that the disclaimers affect only the states' proprietary interest in Indian land. The comprehensive adjudication of water rights is a purely governmental function and therefore beyond the scope of the disclaimers. Moreover, the states do not seek to determine Indian water rights according to state law; rather, the states' governmental interests are served by providing a *forum* to adjudicate *all* water rights in conformity with applicable federal and state law.

State court adjudication of Indian water rights has not been preempted by federal law and does not interfere with tribal sovereignty. Far from preempting state jurisdiction, Congress welcomed the availability of state proceedings to adjudicate federal water rights, including Indian rights. By enacting the McCarran Amendment, Congress removed the last obstacle to the comprehensive adjudication of all water rights — the inability of state courts to obtain personal jurisdiction over all necessary parties. Exclusion of Indian water rights from disclaimer state court proceedings would strip the McCarran Amendment and *Akin* of all real significance.

The nature of water rights determinations requires the adjudication of all rights in a unified proceeding. Bifurcated proceedings in which Indian water rights are determined in federal court and are then "plugged in" to a state general adjudication would be unworkable. Due

process would require joinder of all water users in both proceedings in order to make the separate decrees binding and enforceable. Duplicative litigation, dual appeals, the risk of inconsistent results and other drawbacks inherent in a bifurcated approach are completely contrary to considerations of wise judicial administration and economy. This Court has recognized, and Wyoming's experience illustrates, that state courts are often a more suitable and efficient *forum* for unified proceedings to determine both state and federal water rights.

ARGUMENT

I. DISCLAIMER STATE COURTS HAVE SUBJECT MATTER JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS.

General stream adjudications, which by definition determine *all* rights on a stream system and bind *all* claimants, are critical to the western states' efforts to manage water.[6] The need for general adjudications becomes even more urgent as competing demands on water for agricultural, municipal and energy uses mount. Most, if not all, disclaimer states vest subject matter jurisdiction in their courts to adjudicate rights to use water. For example, Wyoming has vested jurisdiction in its courts to conduct general stream adjudications.[7]

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[6]Historically, general stream adjudications evolved in response to the inefficient, wasteful and duplicative string of private lawsuits brought in state courts to determine the relative rights to the use of water as among only a few claimants to a particular water source. Such determinations, of course, had no conclusive effect on those water users who were not made parties. The end result was that no water right was settled with respect to all other water right holders on a stream. The arguments advanced by Respondents and the United States would wipe out the gains in judicial economy and efficiency which general stream adjudications have made possible.

[7]WYO. STAT. § 1-37-106 (1977).

The Ninth Circuit's holdings threaten the integrity of general adjudications in state courts throughout the West. Affirmance could, as a practical matter, prevent disclaimer states from conducting any general stream adjudications wherever Indian reserved rights are claimed and would seriously disrupt the western states' attempts to deal with their growing water problems.

A. The Narrow Scope of the Disclaimers Does Not Affect the Governmental Authority Under Which a State May Adjudicate All Rights to Use Water.

In *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982),[8] the Ninth Circuit assumed without any analysis that the disclaimers preclude subject matter jurisdiction in the state courts to adjudicate Indian water rights. In doing so, the court below failed to consider the language of the disclaimers or the case law construing their purpose and scope.

At the outset, it is important to recognize the limited nature of the question presented here. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and other cases cited by Respondents are not applicable because those cases involve attempts to impose *state*

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[8]The decisions in *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1100 (9th Cir. 1982), and *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982), rely upon the Ninth Circuit's opinion in *Adsit*. Therefore, all references to *Adsit* herein apply equally to all cases consolidated in this appeal.

laws to regulate Indian activities." By contrast, this case poses the much narrower question of whether a state court may apply *federal* law to determine Indian water rights as part of its adjudication of all rights within a stream system. The issue involves a choice of forum, not a choice of law.

On its face, Arizona's disclaimer (the operative language of which is identical to Montana's disclaimer provision) does not mention state court jurisdiction or water rights:

> The people inhabiting this State do agree and declare that they forever *disclaim all right and title . . . to all lands* lying within said boundaries owned or held by any Indian or Indian tribes . . . and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

ARIZ. CONST., art. XX, §4 (emphasis added).

Although the Ninth Circuit has recognized that disclaimers affect only a state's "proprietary interest in Indian land, not the state's governmental or regulatory authority," *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1280 (9th Cir. 1981), it failed to analyze or

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"*McClanahan* involved imposition of a state income tax on reservation Indians. *Pullyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977), dealt with the application of state fishing regulations to Indian Tribes. *Williams v. Lee*, 358 U.S. 217 (1959), presented a conflict between state and tribal jurisdiction and is discussed in part IB., *infra*. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), dealt with imposition of a state gross receipts tax on an Indian enterprise operating off the reservation. *United States v. Sutton*, 215 U.S. 291 (1909), involved an exercise of Congress' plenary authority to regulate the introduction of liquor into the reservation. Not a single case cited by Respondents involves a state court application of federal law to adjudicate Indian rights.

apply the distinction in these cases. The court below found that, by this language, Montana disclaimed "right and title to jurisdiction over Indian lands." *Adsit*, 668 F.2d at 1084. The Ninth Circuit's reading of the disclaimers in the instant cases is not only inaccurate, it does not make sense. A state cannot disclaim title to jurisdiction. What the states disclaimed was any property right or title to Indian lands.

Moreover, the Ninth Circuit incorrectly assumed that the phrase that Indian lands "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States" requires exclusive federal jurisdiction. This Court has repeatedly rejected that interpretation. *Draper v. United States*, 164 U.S. 240 (1896) (Montana disclaimer did not invalidate state jurisdiction to try non-Indian for crime committee on the reservation); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) ("*Kake*") (Alaska disclaimer did not prevent state regulation of off-reservation fishing). This language is a recognition of Congress' plenary power over Indian tribes which it may exercise in *both* disclaimer and non-disclaimer states. As this Court's analysis in *Kake* shows, state disclaimers of "right and title" affect the states' proprietary rather than their governmental interests; the provisions for "absolute jurisdiction and control" do not preempt the states' exercise of their governmental functions. Where the state's governmental rather than its proprietary interests are at issue, the presence or absence of a disclaimer is irrelevant to determine the permissible contours of state jurisdiction.[10]

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[10]The United States, in its August, 1982 Memorandum in these cases, recognizes this: "The disclaimer provisions appear to be an express confirmation of the general rule, not the fashioning of a new principle . . . we believe it would be wrong to follow a different procedural rule in the disclaimer States on the ground that Congress meant to treat them with special distrust in Indian matters." Memorandum for the United States at 14

The state's interests in having its courts conduct a general stream adjudication are plainly governmental, not proprietary.[11] By conducting a judicial inventory of all water rights in a general stream adjudication, state courts perform a vital governmental function necessary for the sound management of a scarce resource. To accomplish this governmental function, state courts determine state rights in accordance with federal law. *United States v. District Court in and for the County of Eagle*, 401 U.S. 520, 524 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527, 529-30 (1971). Hence, a general stream adjudication does not constitute a proprietary claim by a state, but rather is an exclusively governmental activity that lies outside the disclaimers' narrow scope.

B. State Court Adjudication of Indian Water Rights Has Not Been Preempted by Federal Law, Does Not Interfere With Tribal Sovereignty and Is Necessary to Fulfill An Important State Interest.

While the federal government has broad powers over Indian tribes, this Court has long departed from the view in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), that the states may not exercise any jurisdiction within reservation boundaries. *See, e.g., New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

Under this Court's test of state jurisdiction over Indian matters that have a significant impact outside

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[11]This is not to say that states do not have any proprietary interests at stake in a general stream adjudication. For example, in the Big Horn Adjudication, the Wyoming Fish & Game Department, along with other state agencies, has claimed water rights under state law to carry out its statutory duties. These claims will be accorded the same treatment as all other rights based in state law, including the state water right claims of the federal government and the Indian tribes.

the reservation, *Williams v. Lee*, 358 U.S. 217 (1959), state courts have jurisdiction to adjudicate Indian water rights. *Williams* suggests that state jurisdiction exists unless (1) it has been preempted by federal law, or (2) it infringes on tribal sovereignty. In applying the test, most recently in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court cautioned against the sort of assumptions made by the Ninth Circuit below:

> *This inquiry* is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but *has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake*, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Bracker, 448 U.S. at 145 (emphasis added).

The Ninth Circuit declined to apply *Williams* to these cases, despite this Court's statement that automatic exemptions of Indian tribes from state jurisdiction are not favored. *Bracker*, 448 U.S. at 144. *Williams* is to be applied in precisely this kind of situation where the state has a compelling interest.

The states' interest stems from the interlocking relationship among uses of water within stream systems. The United States and the Indian tribes often claim large amounts of water under early priority dates which could displace existing water uses and the economies which have grown to rely on them. Until the existence, priorities and amounts of these rights are determined, they will cloud state-awarded rights and make it impossible to determine *any* water right in a meaningful way. Consequently, virtually all of the western states have a vital interest in conducting general stream adjudications that include the deter-

mination of Indian water rights. Absent an adjudication of these rights, the rest of the adjudication would be essentially meaningless.

Applying *Williams* to these cases shows that state court jurisdiction may be exercised to determine Indian water rights. First, no federal law prohibits the determination of Indian water rights in state court. The disclaimer provisions were designed to refute state ownership of Indian lands and did not address state court jurisdiction to adjudicate Indian water rights. Indeed, the only federal statute[12] on the subject is the McCarran Amendment, 43 U.S.C. § 666 (1976), in which Congress contemplated that the states would exercise jurisdiction to adjudicate both Indian and non-Indian water rights in unified proceedings. S. REP. NO. 755, 82d Cong, 1st Sess. 2, 7-8 (1951). *Accord, Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 812, *reh'g denied*, 426 U.S. 912 (1976) ("*Akin*").

Second, there has been no suggestion in these cases that adjudication of Indian water rights in state court would infringe upon a traditional sphere of tribal sovereignty. The fact is that the states have traditionally exercised jurisdiction over water rights within reservation boundaries, including rights asserted by the United States on behalf of the Indians.[13]

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[12] Public Law 280 is immaterial because it does not affect existing state jurisdiction. Moreover, Public Law 280, by its own terms, does not apply to the adjudication of Indian water rights. Pub. L. No. 280, ch. 505, §4, 67 Stat. 588 (1953) (codified at 28 U.S.C. § 1360 (1976)).

[13] *See, e.g., Biggs v. Utah Irrigating Ditch Co.*, 7 Ariz. 331, 64 P. 494 (1901) (state court determination that water rights of Indians to water from the Utah Canal arose by prescription and were as firmly established as the rights of canal shareholders).

The Ninth Circuit's failure to acknowledge the states' traditional exercise of jurisdiction within reservations also threatens the validity of state-awarded water rights for use on Indian reservations which exist in many western states. For example, beginning in 1905, the Wyoming State Engineer issued permits to irrigate approximately 140,000 acres of Indian land within the present boundaries of the Wind River Indian Reservation upon the application of the United States, pursuant to an express Congressional directive.[14] Those rights, many of which were perfected into certificates, would be invalidated by a finding that the states have no jurisdiction over Indian water rights.[15] Even if those rights were not affected, it is difficult to square the United States' express request to states such as Wyoming to exercise their jurisdiction to grant state water rights for the irrigation of present reservation lands with the Ninth Circuit's denial of state jurisdiction to adjudicate Indian reserved rights.

The cases cited by Respondents are inapposite because they involve the states' authority to *regulate* tribal matters or Indian conduct. In these cases, the states do not seek to impose state law or regulations on Indians or intrude on tribal self-government. Nor do these cases involve conflicting state and federal regulatory schemes. The states are carrying out a purely governmental function to adjudicate all rights within a river basin for the common good by applying applicable federal and state law.

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[14] 33 Stat. 1016 (1905).

[15] In light of its highly unusual facts (a closed river system which arises and terminates within the boundaries of an Indian reservation), *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 102 S. Ct. 657 (1981) is not general authority concerning the limits of state jurisdiction over water within Indian reservations.

The Ninth Circuit's assumption that disclaimers deprive the states of jurisdiction, an assumption that is directly contrary to this Court's distinction between proprietary and governmental interests of the states, is incorrect. Under *Williams*, state court jurisdiction to adjudicate Indian reserved rights has not been preempted by either federal or tribal interests and, in fact, is necessary to carry out the congressional goals of the McCarran Amendment as well as other statutes,[16] which expressly require the acquisition of state water rights for Indian lands.

II. THE McCARRAN AMENDMENT AND THIS COURT IN *AKIN* HAVE CONFIRMED THE STATES' JURISDICTION TO ADJUDICATE INDIAN WATER RIGHTS.

A. The McCarran Amendment Permits the States to Exercise Subject Matter Jurisdiction Over Indian Water Rights.

The power of state courts to assume personal jurisdiction over the United States for the purpose of adjudicating Indian water rights has been established. In *Colorado River Conservation District v. United States*, 424 U.S. 800, *reh'g denied*, 426 U.S. 912 (1976) ("*Akin*"), this Court viewed the Government's trusteeship of Indian rights as ownership and extended *Eagle County* and *Water Division No. 5* by holding that the United States is the proper party to protect *all* reserved rights, including those set aside for use by Indian tribes. *See Akin*, 424 U.S. at 810.

After *Akin*, it is beyond dispute that state courts have subject matter jurisdiction over Indian water rights in the absence of an effective disclaimer. Moreover, the legislative history of the McCarran Amendment and this Court's decision in *Akin* show that the

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[16] *See supra* note 14.

disclaimers have no application in the realm of state court general stream adjudications.

Congress enacted the McCarran Amendment in the belief that the United States' sovereign immunity was the sole obstacle preventing the comprehensive water rights determinations that were badly needed in the West. On the floor of the Senate, Senator McCarran explained the need for the bill:

> Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all the parties owning or claiming to own any rights to the stream. *If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious.* Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results.

97 Cong. Rec. 12,948 (1951) (emphasis added). This dilemma existed in *all* of the arid western states, and Congress intended to solve the dilemma by allowing state courts to assume personal jurisdiction over all necessary parties, thereby making comprehensive general stream adjudications possible. The Judiciary Committee report on the bill notes:

> [I]f any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a *State court*, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the *State courts*.

S. REP. NO. 755, 82d Cong., 1st Sess. 5 (1951) (emphasis added).

Congress plainly perceived the need to adjudicate *all* water rights within the context of a unified general stream adjudication, one which had historically been conducted by state courts. As this Court observed, "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means of achieving these goals." *Akin*, 424 U.S. at 819.

The distinction between disclaimer and non-disclaimer states is not discussed anywhere in the McCarran Amendment or its legislative history. In fact, during the Senate debate, Senator McCarran stated:

> Let me say to the Senator from Arizona [Mr. McFarland] that *there is no State in the Union more interested in the bill than is the State of Arizona*, because the State of Arizona recognizes the right of prior appropriation as against riparian doctrine. The state of New Mexico, the State of Nevada, the State of Idaho, the State of California — in fact, all the western and semi-arid States — are interested in the bill . . . .

97 Cong. Rec. 12,948 (1951) (emphasis added). Given that Congress contemplated and indeed welcomed the availability of state courts to achieve the McCarran Amendment's goals, this statement by Senator McCarran indicates that Congress was either unaware of or unconcerned about the existence of disclaimers in the constitutions and enabling acts of many western States. Congress believed that the McCarran Amendment finally would make it possible for all states to exercise their subject matter jurisdiction to determine all water rights.

B. Exclusion of Indian Water Rights From State Court Proceedings Would Defeat the Purpose of the McCarran Amendment.

Senator McCarran, the sponsor of the bill, stated that its purpose is:

> . . . to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because *unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.*

S. REP. NO. 755, 82d Cong., 1st Sess. 9 (1951) (emphasis added). *Eagle County*, 401 U.S. 520 (1971), and *Water Division No. 5*, 401 U.S. 527 (1971), held that federal reserved rights are subject to adjudication in state proceedings for the determination of water rights. *Akin* held that this includes *all* federal water rights, including those set aside for use by Indians. *Akin*, 424 U.S. at 809. The Court ruled: "[B]earing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." *Id.* at 811.

More important, in *Akin* the Court reiterated the importance of allowing all claims to be adjudicated in state courts. The Court unequivocally recognized that the availability of comprehensive state systems for adjudication was one of the premises upon which Congress acted in passing the McCarran Amendment. *See Akin*, 424 U.S. at 819.

The practical effect of the Ninth Circuit's decision may be to preclude the adjudication of *any* federal water rights (not just those held for Indians) in disclaimer

state courts. *Dugan v. Rank*, 372 U.S. 609 (1963), held that the McCarran Amendment's waiver of federal sovereign immunity operates only in cases involving "a *general* adjudication of 'all of the rights of various owners on a given stream.'" 372 U.S. at 618. If Indian water rights cannot be determined in state courts because of the disclaimers, then arguably the conditions have not been met for waiver of the United States' sovereign immunity and the United States' rights, likewise, cannot be adjudicated.

It is no answer to say that the McCarran Amendment's objectives may be achieved by adjudicating these rights in federal court. This Court rejected that approach in *Akin* because it is inconsistent with the Court's understanding that the Amendment is premised upon the availability of state proceedings:

> Indeed, if exclusion of Indian rights were the conclusion, conflicts between Indian and non-Indian rights, as well as practical matters of adjudication, might have the effect of requiring district court adjudication of non-Indian along with Indian rights, thereby effectively vitiating our construction of the amendment in *Eagle County* and *Water Div. 5*.

Akin, 424 U.S. at 811 n.17.

Because most of the states where Indian reserved rights are likely to be claimed are so-called disclaimer states, *see* Memorandum for the United States at 12-13 (August 1982) (filed herein), even the United States recognizes that confining *Akin* to nondisclaimer states renders the decision insignificant. *Id.* If the Ninth Circuit is upheld here, the policy of the McCarran Amendment that recognizes the availability of comprehensive state systems for unified proceedings to adjudicate water rights will be vitiated.

III. STATE COURTS OFFER THE BEST FORUM FOR UNIFIED PROCEEDINGS TO DETERMINE ALL WATER RIGHTS.

A. General Adjudications Must Be Unified and Comprehensive; Bifurcated Proceedings Cannot Serve the Principles of Wise Judicial Administration.

In *Akin*, this Court recognized the interlocking relationships between all water rights on a stream, including rights based on federal law,[17] and affirmed the overriding necessity for unified proceedings to adjudicate those rights in state court:

> The clear federal policy evidenced by that legislation [the McCarran Amendment] is the avoidance of piecemeal adjudication . . . . *This concern is heightened with respect to water rights, the relationships among which are highly interdependent.* Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are *best conducted in unified proceedings.*

Akin, 424 U.S. at 819 (emphasis added)

The Memorandum for the United States proposes bifurcated proceedings to allow Indian rights to be determined in federal court and then "plugged in" to a state

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[17] All rights on a stream are interdependent because the scope of each water right depends not only on the quantity of the right but on the relative priority of each water right *vis a vis* other rights on the stream. This is true regardless of whether the right to use water is based on federal law or state law.

general adjudication proceeding.[18] Such an approach ignores not only the very purpose of the McCarran Amendment but also the considerations of wise judicial administration set forth in *Akin*. Contrary to the United States' assertion that such an approach "would avoid duplications and lessen the burden of the federal courts in dealing with matters properly left to state tribunals," Memorandum for the United States at 18, bifurcated proceedings would lead to precisely the opposite result.

Segregation of claims into two proceedings would require that all water claimants be made parties to both federal and state actions in order to be bound by the outcome, resulting in duplicative litigation, attorneys' fees, and court costs. Dual appeals could follow resulting in an unwieldy and unprecedented review process. Furthermore, dividing water right adjudications between state and federal courts would make it next to impossible for either forum to arrive at determinations that bear any relation to the physical realities of the stream system. Finally, bifurcated proceedings would prevent courts from taking account of the potential impacts of reserved rights on longstanding uses.

In its memorandum, the United States recognizes that if the federal government or an Indian tribe initiated a proceeding to determine solely the reserved

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[18]"The determination of Indian reserved water rights is not as quick and easy as the United States and Respondents suggest. The process requires a great deal of expert testimony and documentation concerning history, hydrology, soils science, agricultural engineering, economics and other areas. The inquiry within any particular discipline often can be searching and complex. For example, soils disputes in the Big Horn Adjudication concerned depth to barrier, slope, hydraulic conductivity, alkalinity, salinity, topography, intensity of investigation and other factors. One witness spent two weeks testifying about these matters. In that case, the United States presented 13 witnesses (many of whom appeared more than once) and submitted 495 exhibits in its case-in-chief on behalf of the Tribes. The Arapahoe and Shoshone Tribes presented 10 additional witnesses and submitted 139 direct exhibits on their own behalf.

rights of an Indian tribe in federal court, *all* of the competing claimants must be given notice and opportunity to contest the tribe's claims in order for the federal court's determination to be enforceable against those claimants.[19] What the United States fails to state is that as a result, claimants of state water rights would have to be joined in no less than two separate proceedings — the federal action and a state proceeding to adjudicate their state rights.[20]

Likewise, if a tribe wished to challenge any of the state-awarded rights, it would have to participate in the state proceedings as well. This scheme would be a lawyer's field day but no picnic for the litigants.

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[19]Memorandum for the United States at 17-18. Due process requires that for any water right to be enforceable, all water users on the stream must be served with notice and be given an opportunity to contest the asserted right. *See, e.g., Schroeder v. New York*, 371 U.S. 208 (1962); *Washington v. Oregon*, 297 U.S. 517 (1936); *United States v. Oregon*, 295 U.S. 1 (1934); RESTATEMENT (SECOND) OF JUDGMENTS §17 (1982). This is no hollow safeguard but is necessary to assure that any water user's right can not be diminished by another water user who has not proven his right to the water.

Although a water user's priority may have been previously established, as a practical matter, his access to water in priority may be threatened by a newly-asserted senior claim. A senior right upstream may deplete the water available to the user. A senior right downstream may force the user to curtail his diversions completely. Both legally and practically, each water user must have an opportunity to challenge the existence, amount, and priority of any senior right, the exercise of which could curtail his own use of water.

[20]The United States also fails to indicate whether its approach would require its own non-Indian rights to be determined in a separate federal court proceeding which would require adverse claimants to be joined in yet another proceeding if they are to be bound by the federal decree. The alternative would be to proceed in a state court action which arguably would fail to meet requirements of a general stream adjudication under the McCarran Amendment (due to the absence of the Indian claims) thereby making determination of the federal claims impossible without the United States' consent.

If the United States or a tribe brought an action for a determination of the tribe's rights *without* giving competing claimants notice and an opportunity to be heard, the federal decree would be worthless because it could not be enforced against any other claimant including the United States or another tribe.[21] Judge Merrill pointed this out in his dissent in *San Carlos:* "[A]n adjudication of the rights of the plaintiff Tribes would accomplish nothing since it could have no binding effect on the absent claimants." *San Carlos*, 668 F.2d at 1099.[22] A decree binding as to only a few claimants would be equally worthless because it would be unadministrable. Consequently, all water users would have to be joined in the federal proceeding to make the federal decree enforceable.

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[21]For example, assume that two Indian reservations lie within the same watershed and that each tribe initiates a separate action to determine its water rights. Assume further that while each tribe is awarded a water decree, there is not enough water to satisfy both decrees. The tribe with the senior priority date theoretically would be entitled to curtail the diversions of the junior tribe. However, because their respective rights would have been determined in separate proceedings, the senior tribe could not enforce its decree against the junior.

While this example may seem improbable, several of Respondents in this matter could face a similar situation. The San Carlos Apache Tribe, the Salt River Pima-Maricopa Community and the Payson Community of the Yavapai-Apache Indians all claim reserved rights in the Salt River Watershed. If these tribes prosecute their water rights claims in separate actions, they could find themselves unable to enforce their rights even against competing tribes within the same river basin.

[22]The only way a tribe could enforce its water right against a water user who was not a party to the federal proceeding (or who was not given an opportunity to become a party) would be to *relitigate* its right against that water user. Not only would these duplicative proceedings waste time and money, but readjudication raises a clear possibility that the second determination would be inconsistent with the first. The resulting inconsistent decrees, each binding on different parties, would create chaos in the administration of the river.

The United States also fails to consider that bifurcated proceedings would create a cumbersome and unprecedented dual appeals process. Dual appeals would increase the likelihood of delays and inconsistent results.[23] A unified proceeding completely sidesteps the procedural morass of bifurcated appeals.

The proposal for bifurcated proceedings also ignores the interaction between state and federal law inherent in the adjudication of Indian water rights. Determinations of water rights require more than a straightforward application of federal law and may involve novel questions of state law.[24]

Furthermore, the physical realities of the stream and the interlocking nature of water rights simply will not

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[23]To illustrate, if a tribe were not satisfied with the federal district court determination of its rights, the appeals process would begin in the circuit courts. The state proceeding into which the federal determination would be "plugged" would probably be delayed pending resolution of the federal appeal. If the state proceeding were not stayed and the appeals court altered the judgment, the state court's final decree would have to be modified. If an appeal was then taken from the state final decree, the state appeals court could then be put in the awkward and unintended position of reviewing a judgment of the federal appeals court.

[24]For example, in the Wyoming Big Horn Adjudication, the United States and the Tribes contend that state-awarded certificates of appropriation are prima facie evidence that the lands irrigated under those state rights constitute "practicably irrigable acreage." While the ultimate issue is one of federal law, the evidentiary question raises a novel matter of state law. In a state proceeding, the determination would be subject to review by state appellate courts who act as the final arbiters of state law. However, in a bifurcated proceeding, the federal court would either have to certify the question to the state supreme court for determination or attempt to apply state law with no opportunity for state court review.

permit bifurcation of water rights determinations.[4] General stream adjudications require that courts consider the interconnection between federal and state water rights. This Court has held that "the implied reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." *United States v. New Mexico*, 438 U.S. 696, 718 (1978) (Powell, J., dissenting) (citing majority opinion, *Id.* at 699, 701-702, 705). But divided proceedings, particularly where there are several independent federal actions to determine the rights of several tribes, would make it impossible for a court to gauge the impact of the claims of one reservation on the water rights of other water users.

The United States' assertion that the Big Horn Adjudication supports their proposal for bifurcated proceedings is simply wrong. The Big Horn Adjudication stands for exactly the opposite proposition. The fact that the trial to determine the reserved rights of the Wind River Indian Reservation was conducted as the first phase of the adjudication shows that Respondents' fears that determination of their reserved rights must await the determination of thousands of private rights are unwarranted. Moreover, the Big Horn Adjudication demonstrates that state adjudication of Indian reserved rights obviates the need for dual proceedings, dual appeals and the attendant delay, risk of inconsistent

[4] In the Big Horn Adjudication, the United States and the Tribes claim a reserved right to water transported through the Wyoming Canal, which also carries water used under state-awarded permits. In order to adjudicate the state and federal claims, the court must be aware of the capacity of the canal as well as the amounts of competing federal and state claims. If the maximum capacity is 40 c.f.s. (cubic feet per second), the total of all rights decreed cannot exceed that amount. But in bifurcated proceedings, a federal court could award to the Tribes a reserved right of 30 c.f.s. and a state court could award a state right of 20 c.f.s. The determinations of the courts would be irreconcilable with the physical limitations of the canal itself. As a result, the conflicting decrees would be impossible to administer.

results and duplication inherent in divided proceedings and permits the application of the reserved rights doctrine with sensitivity to its impact on other water users.[26]

B. State Courts and Appellate Procedures Offer a Sound Framework for the Determination of Both Federal and State Questions Presented By General Stream Adjudications.

The Court's opinion in *Akin* stressed the need for unified proceedings to determine water rights, and with good reason. A general stream adjudication in state court is the best and perhaps, as a practical matter, the only way to definitively establish water rights and resolve conflicting claims to water. Moreover, as this Court recognized in *Eagle County, Water Division No. 5* and most recently in *Akin*, state courts may be a more suitable forum in light of the extensive involvement of state law claims, the state courts' familiarity with water rights determinations and the states' specially-tailored procedures to guide the adjudication.

There is a significant risk that if general adjudications cannot be conducted in state court, they will not be conducted at all. The availability of a federal forum for general stream adjudications is problematic for two reasons. First, it is questionable whether any party other than the United States or an Indian tribe could initiate a general stream adjudication in federal court. Because the interests of the states and of private water users are based in state law, arguably they would have

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[26]In adjudicating the rights of Wind River Indian Reservation, the Special Master heard testimony from officials of the City of Lander, Wyoming, concerning the impact of the Tribes' claims on the City's municipal water supply. Some forty other water users also appeared to present evidence concerning the impact on their use of water of the United States' and Tribes' claims.

no standing to assert a right "under the Constitution, laws and treaties of the United States" under the federal question grant of jurisdiction, 28 U.S.C. § 1331 (1976).[27]

Second, the United States and many Indian tribes have demonstrated thus far a reluctance to initiate general stream adjudications in federal court. As the United States admits, it is intolerable to permit unquantified rights to cast a shadow over other claims simply because neither the United States nor an Indian tribe is ready or willing to submit the matter to adjudication in any forum. Memorandum for the United States at 17. However, that is the unfortunate but likely result if disclaimer states are precluded from adjudicating Indian reserved rights in state general stream adjudications.

The extensive state claims in most adjudications make state court the more suitable forum. In the Big Horn Adjudication, over 20,000 claimants have asserted more than 12,000 state water rights. The United States also seeks to perfect over one hundred state water rights on behalf of the Tribes.

What is more, the states have developed special procedures that federal courts do not have to guide and expedite the course of general adjudications.[28] Some states, including Colorado and Montana, have established special water courts and have designated water

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[27] Arguably, the United States or an Indian tribe could create jurisdiction by voluntarily realigning as plaintiffs, thereby permitting the court to assume jurisdiction under 28 U.S.C. § *1331, 28 U.S.C.* § 1345 (U.S. as plaintiff) or 28 U.S.C. § 1362 (Tribe as plaintiff). This is the situation presented by *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), in which the court's jurisdiction was not at issue.

[28] *See, e.g.*, WYO. STAT. §1-37-106; ARIZ. REV. STAT. ANN. §§45-251 *et seq.* (1982 Supp.); MONT. CODE ANN. §§85-2-211 *et seq.* (1981); COLO. REV. STAT. §§37-92-101 *et seq.* (1977).

judges who are well-versed in the legal and physical complexities of water allocation.[29]

State courts are fully competent to apply federal law. There is no better demonstration of this fact than this Court's affirmance of the New Mexico state court's determination of federal reserved rights in *United States v. New Mexico*, 438 U.S. 696 (1978). Moreover, all state determinations of federal rights are subject to this Court's review. *Akin*, 424 U.S. at 813.

Finally, this Court specifically addressed the issue of whether state courts would fairly determine Indian water rights and concluded that they would:

> Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration . . . . Indian interests may be satisfactorily protected under regimes of state law.

Akin, 424 U.S. at 812. *See also Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 611, *reh'g denied*, 421 U.S. 971 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.") This Court decided in *Akin* that state courts are a desirable forum for the adjudication of all water rights. These cases present no reason to alter that judgment.

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[29] *See, e.g.*, COLO. REV. STAT. §37-92-203 (1977); MONT. CODE ANN. §§3-7-101 *et seq.* (1981). Other states do not provide for special water courts as such, but may provide for appointment of special masters. In this sense, the state and federal procedures are similar and a federal forum offers no advantage. By suggesting that both state and federal courts employ the same master, the United States reveals the hollowness of its argument in favor of separate federal court determinations of Indian water rights. Memorandum for the United States at 18-19, n.21.

CONCLUSION

The Ninth Circuit's holding that disclaimers deprive state courts of jurisdiction to adjudicate Indian water rights is incorrect. This Court should reverse.

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